BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is reported in 151 Fed. (2d) 397, and appears on pages 221 to 226 of the transcript of the record filed herewith.

JURISDICTION OF THIS COURT.

The opinion and judgment of the Circuit Court of Appeals herein were filed on October 29, 1945 (R. 222, 226). The petitioners filed their petition for rehearing on November 13, 1945 (R. 227), which petition was denied on December 5, 1945 (R. 261). On December 14, 1945, the Circuit Court of Appeals stayed the mandate for thirty days, pending petitioners' Application for Writ of Certiorari (R. 261). The jurisdiction of this Court is invoked under Sec. 24, c, of the Bankruptcy Act (11 U. S. C. A., Sec. 47, c), and Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a).

STATEMENT OF THE CASE.

The original petition (R. 6) was filed on July 27, 1944. The original petitioner's claims aggregate $60,862.45 (R. 32, 33). The respondent with his answer listed (R. 49) 22 unsecured creditors. As to 16 creditors on this list, the Referee correctly found (R. 53):

> "This list shows that 16 of the 22 creditors have claims respectively for amounts less than $50.00 and that 13 of that number have claims which range from $6.00 to $30.00. The above named 16 creditors could be classified as representing household and personal expenses of the alleged bankrupt for groceries, doctor

bills, drugs, auto repairs, clothing, telephone and minor household repairs. They are similar to the usual monthly bills that any head of a family would normally incur."

The 16 challenged claims are as follows (R. 49):

	Name	Amount	Date	For
1*	Lionberger's Auto Repair....	$ 22.50	7/ 7/44	Repairs on auto
2	Southwestern Bell Tel. Co...	28.69	6/23/44 to 7/16/44	Telephone bill
3	Frederick Jewelry Co........	14.00	7/13/44	Jewelry
4	Hastons Cleaners	20.10	6/ 1/44 to 7/27/44	Dry cleaning
5	Owens Grocery Co...........	6.00	6/20/44	Groceries
6	Cleveland Gro.	29.29	6/22/44 to 7/27/44	Groceries
7	McClintic Gro.	11.82	7/15/44	Groceries
8	North Missouri Lbr. Co......	11.22	7/12/44	Air conditioners
12	Ellis Clothing Co.	29.40	7/27/44	Clothing
13	Clark's Pharmacy	6.00	7/15/44	Drugs
14	Dr. M. M. Russell	25.00	7/10/44	Medical services
15	Markey Tin Shop	40.00	6/ 1/44	Gutter on Bldg.
16	B. S. Fraley.................	35.00	7/20/44	Meat
17	Parsons Barber Shop........	10.00	6/ 1/44 to 7/27/44	Barber work
18	Guy Cox	6.00	7/12/44	Services on car
20	John Owens	45.00	1/10/43	Balance on mule
	Total....................	$340.02		

* These numbers correspond to the numbers on the respondent's list, Exhibit A (R. 49).

Of the above 16 claims, 13 were contracted in July, 1944 (four having June to July dating), the month in which the original petition was filed. Two of the remaining three were contracted in June, 1944. The 13 July bills were not due until August or until after the filing of the petition in bankruptcy. They are current accounts. The 16 claims aggregate $340.02, or .0056 of the original petitioner's claims. None of these claims exceed $45.00 in amount; 13 are for less than $30.00 and six are for less than $12.00 each. As to nature, four are for groceries and meat; seven are for repairs and service; two are for medical bills and drugs; one is for clothing; one is for jewelry and the other is for balance due on a mule.

The respondent listed his assets at $278,500.00 (R. 27,

50, 51). He valued his residence and its furnishings at $24,000.00; Texas lands and personalty, $190,000.00; securities, $54,000.00; other personal property, $10,500.00. He listed secured claims, $83,078.00 (R. 27, 50, 51); unsecured claims, $9,859.52 (R. 49). He did not list the original petitioner nor the interveners as creditors in any amounts.

The claims of 11 of the 16 creditors last mentioned aggregate but $161.33 (the largest of which is $28.69), or .0027 of the original petitioner's claims. If the above 16 creditors or even the last mentioned 11 of them are not counted, then respondent's creditors are less than 12 in number. The original petitioner contended that these small-current-account creditors should not be counted under the Bankruptcy Act, as amended by the Chandler Act of 1938. The Referee held (R. 52) that the small-current-account creditors should be counted in computing the total number of creditors, and on October 4, 1944, ordered the proceeding dismissed (R. 59).

The Committee resides at St. Louis, Mo. (R. 73). Interveners and respondent reside in or near Chillicothe, Livingston County, Mo. (R. 63, 76). The Committee owned land in Livingston and Linn Counties, Mo. Respondent was the Committee's field agent (R. 135). Respondent held the title to these lands in his name, but for the use and benefit of the Committee (R. 139).

Although respondent made no representation as to the nature, the quality or the value of the land, he was guilty of a far reaching misrepresentation as to the nature and substance of the transaction. There was a series of misrepresentations. At the beginning respondent represented that he would forward the offer received from the intervener (R. 86, 111, 136); he did not intend to do this since it is obvious that he had the scheme to defraud in mind at that time. In each transaction, he withdrew page 2 (which recited the larger sum as the sale price) from the

genuine instrument signed by the intervener and substituted therefor page 2 (which recited the smaller sum as the sale price) in the instrument which he presented to his principal for its signature. After this first substitution and after making misrepresentation to his principal by which he obtained the principal's signature to an instrument, the last page of which bore the signature of the intervener, but which was not the instrument signed by the intervener (R. 86, 112, 136), respondent withdrew page 2 (which recited the smaller sum as the sale price) from the genuine instrument signed by the Committee, and presented to the intervener the false sale contract produced by connecting together with the remaining pages of the instrument signed by the Committee, page 2 (which contained the larger sum as the sale price) previously withdrawn by him from the genuine instrument which had been signed by the intervener (R. 87, 112, 136). Respondent returned the false instrument to the intervener with the signature of his principal upon the last page (R. 87, 112, 136). This was a misrepresentation to the intervener since the principal had not signed the instrument and since respondent had not in fact communicated the intervener's offer to his principal. He represented that his principal was bound by the spurious contract (R. 87, 113, 136). He represented that when he received the payment from the intervener he would transmit it to his principal (R. 87, 113, 136), although he did not intend so to do. He misrepresented to the intervener the higher sum as his principal's sale price. As a result of this series of misrepresentations, he obtained the money from the intervener (R. 66, 69, 76).

The sale instruments expressly provided that the Committee's personal signature was essential to their effectiveness. The express condition referred to, which was common to each instrument, reads as follows (R. 97, 121, 143):

"It is further understood and agreed that this contract shall not be binding or obligatory on first parties until after they have duly approved and **signed** the same, it being understood that this contract, although first signed by second party, shall first be submitted to first parties for their approval and the same shall not be or become binding on first parties in any way until they have duly executed the same. First parties are to approve or reject this contract on or before the 18th day of January, 1941." (Emphasis ours.)

The following is the allegation in Barnhart's claim (R. 76), the substance of which allegation was common to the claims of the other two interveners (Rec., pp. 66, 69):

"On or about December 12, 1939, the said Durward Belmont Luther falsely and fraudulently represented to your petitioner that your petitioner was obligated to pay to said Luther the sum of Four Hundred Forty and 00/100 Dollars ($440.00) as part of the purchase price of a certain tract of land located in Grand River Drainage District, in Livingston County, Missouri, under a pretended contract, by said Luther delivered or caused to be delivered to your petitioner, purporting to be for the sale of said tract of land to your petitioner, to be dated November 17, 1939, and **to be signed** by your petitioner, as vendee, and by Wyllys K. Bliss, W. L. Hager and Harry Theis, as the Bondholders' Protective Committee in the matter of certain bonds of the Grand River Drainage District of Livingston and Linn Counties, Missouri, as vendors, whereas, in truth and fact, as said Luther well knew, the said pretended contract **was not signed** by said committee and there was no such contract; your petitioner was not so obligated to make such payment to said Luther, and said payment was not part of the purchase price of said land but was unjust enrichment to said Luther. Your petitioner by mistake, caused or induced by believing the said false and fraudulent representation of said Luther intended or calculated as aforesaid to cause or induce your peti-

tioner to make said payment, and by relying on such false and fraudulent representation and being so deceived, paid the said Four Hundred Forty and 00/100 Dollars ($440.00) to the said Luther." (Emphasis ours.)

The sufficiency of interveners' claims cannot be adjudged upon the allegations of the Committee's claims, but if the Court of Appeals did consider the Committee's allegation that respondent was employed "to negotiate and consummate sales" (R. 31), authority to negotiate, in view of the express condition requiring the signature of the Committee does not of course imply power in the respondent to execute the contracts. That this fact of lack of authority to execute contracts was well recognized by respondent himself is established by his very switching of the second pages. His sole authority, as concurrently alleged by the Committee, was "to develop sales therefor and recommend to your petitioners, based upon his knowledge of such highest and best prices, as to acceptance or rejection by your petitioners of offers to purchase said lands resulting from his said efforts" (R. 31).

STATUTES INVOLVED.

Section 59 (b) (d) (e) and (f) of the Bankruptcy Act, 11 U. S. C. A., Section 95 (b) (d) (e) and (f) [portions deleted by the Chandler Act are shown in brackets; portions added by the Chandler Act are shown in italics], provides:

"(b) Three or more creditors who have provable claims *fixed as to liability and liquidated as to amount* against any person which amount in the aggregate in excess of the value of securities held by them, if any, to $500 [five hundred dollars] or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

"(d) If it be averred in the petition that the creditors of the bankrupt, *computed as provided in subdivision e of this section,* are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses *and a brief statement of the nature of their claims and the amounts thereof,* and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that *the* parties in interest shall have an opportunity to be heard. If upon such hearing it shall appear that a sufficient number *of qualified* creditors have joined in such petition or, if prior to or during such hearing, a sufficient number *of qualified creditors* shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

"(e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, *there shall not be counted (1)* such creditors as were employed by the *bankrupt* [him] at the time of the filing of the petition; *(2) creditors who* [or] are *relatives of the bankrupt or, if the bankrupt is a corporation, creditors who are stockholders or members, officers or members of the board of directors or trustees or of other similar controlling bodies of such bankrupt corporation; (3) creditors who have participated, directly or indirectly, in the act of bankruptcy charged in the petition; (4) secured creditors whose claims are fully secured; and (5) creditors who have received preferences, liens, or transfers void or voidable under this title* [related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition shall not be counted].

"(f) Creditors other than *the* original petitioners

may at any time enter their appearance and join in the petition." [, or file an answer and be heard in opposition to the prayer of the petition.]

Section 4587, R. S. Mo. 1939 (Vol. 1, p. 1092), provides:

"**Section 4587. Attaching together genuine instruments, when forgery.** When different parts of several genuine instruments shall be so placed or connected together as to produce one instrument, with intent to defraud, the same shall be deemed forgery in the same manner and in the same degree as if the parts so put together were falsely made or forged."

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred

1. In holding that creditors with small claims for current accounts should be counted in computing the number of respondent's creditors under Sec. 59 (b) of the Bankruptcy Act.

2. In holding that respondent committed no fraud upon interveners.

3. In holding that in each of the transactions with interveners there was a valid sale contract.

4. In holding that attaching together different parts of two several genuine instruments so as to produce one false instrument with intent to defraud was not forgery.

5. In holding that the agent is without liability to interveners because of his duty to account to his principal.

6. In holding that intervener may not elect to claim for money had and received under Sec. 63 (a) (4) of the Bankruptcy Act rather than for damages in tort.

7. In refusing to hold that the interveners are entitled to recover for money had and received, even though they suffered no damages.

8. In failing to follow either local or Federal law in determining the provability of interveners' claims.

ARGUMENT.

A. ARGUMENT AS TO FIRST QUESTION PRESENTED.

QUESTION ONE, POINT I.

Under the Chandler Act (1938) Creditors With Small Claims for Current Expenses Are Not to Be Counted Among the Total Number of the Bankrupt's Creditors in Determining Whether They Are Less Than Twelve.

The right of a single petitioner to maintain an involuntary petition in bankruptcy against his debtor is a substantial, and not an illusory right given creditors by the Act.

The abusive use of the Act by a number of creditors having small claims as against fewer but more substantial creditors, appeared under the Act of 1867 (14 Stat. 536, Chap. 176, Sec. 39). Beginning with the Amendatory Act of 1874 (18 Stat. 180, 181, 182, Chap. 390, Sec. 12), as will presently appear, this power of small-claim creditors to dominate a bankruptcy proceeding has been gradually curtailed, by subsequent Acts and by "case made law."

The machinery set up by the Amendatory Act of 1874, supra, for the curtailment of the power of small creditors to invoke the provisions of the Act, was the requirement that where the bankrupt denied in his answer the sufficiency in number of the petitioning creditors, he should file a full list of his creditors showing the "sums due them respectively," and further provided that in computing the number of creditors, those whose claims were less than \$250.00 should not be counted, unless there be no creditors with claims in excess of \$250.00, or if there be such creditors and they fail to join in the petition. See 18 Stat. 182,

Chap. 390, Sec. 12. This act of 1867, as amended, was repealed in 1878.

The next Act (1898), 30 Stat. 561, 562, Chap. 541, Sec. 59, 11 U. S. C. A., Sec. 95, did not contain the requirement that the bankrupt should disclose in the list filed with his answer the nature of his creditors' claims and the amounts thereof. It expressly excluded only two classes of creditors (employees and relatives), but it did not not expressly exclude small-current-account claims. (None of the Acts have expressly excluded small-current-account claims.) Nevertheless, under this Act, one line of decisions held that the bankrupt must disclose in his answer the nature of their claims and the amounts due his respective creditors and small-current-account claims were not counted, (1) on the ground that they are practically secured, and (2) by application of the maxim "De minimis non curat lex." These decisions declared "case made law." Another line of decisions under this Act held that since this Act did not expressly exclude small-current-account claims they should be counted under the maxim, "Expressio unius est exclusio alterius." These decisions made no "case law," but followed the Act literally. This distinction is important here, as we will hereafter point out.

The Chandler Act by amendment to Sec. 56c expressly curtailed the voting power of small claimants in matters submitted at creditors' meetings.* By eliminating old Sec. 55d, it expressly curtailed their power to prevent the call of a special meeting of creditors.** Pertinent to the situation at bar, the Chandler Act placed in Sec. 59 (d)

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* By amendment of Sec. 56c, claims of $50.00 or less shall not be counted in computing the number of votes, but only in computing the amount.

** By omitting old Sec. 55d and enacting new Sec. 55d, a special meeting of creditors may be called by one-fourth in number of creditors rather than by a request in writing by all creditors, and the majority in number and amount of such creditors may designate the place for holding the meeting.

the requirement (from the amendatory Act of 1874) that the bankrupt should include with his list a "brief statement of **the nature** of their claims and **the amounts** thereof." (Emphasis ours.)

The replacement in Sec. 59d of the 1938 Act of the provision of the Act of 1874 requiring the bankrupt to list the nature and amount of the claims of his respective creditors is evidence of the intent of Congress to make provision for the exclusion of small-current-account claims as being secured for all intents and purposes of the Bankruptcy Act and application of the "de minimis" maxim.

Congress intended (as disclosed by the Report of the House Committee on the Judiciary) that this provision (disclosure of nature and amounts of creditors' claims) in the 1938 Act should serve the same purpose as it was intended to serve in the Act of 1874. That purpose was stated by the Court in **W. A. Gage & Co. v. Bell** (D. C. Tenn., 1903), 124 Fed. 371, l. c. 377 et seq. (which arose under the 1898 Act), as follows:

> "But by section 12 of the Amendatory Act of June 22, 1874 (18 Stat. 178, 180, ch. 390), provision was made against trivial debts being used to sustain an involuntary petition, presumably to meet the experience had in that regard under the original act.
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> * * * * * * *
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> "Costly bankruptcies, instituted by creditors with trivial debts, not amounting in the aggregate to more than $250.00, and very small in amounts due each creditor, were distasteful to public opinion, as being trifling with the process of the courts about matters not worthy of such attention. The foregoing provision of the Amendatory Act was a protest against such petty litigation, and yet, as will be observed, Congress was not quite willing to cut off small creditors altogether from the remedy by bankruptcy procedure. Later disgust with the act for this and other reasons

swept it off the statute book. The Act of 1898 seems to tolerate voluntary and involuntary proceedings based on the smallest debts, but this history concerning the old act should warn those resorting to the new not to abuse it for petty litigation, even if thought to be permissible under it.

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"But counsel for the petitioning creditor, Gage & Co., forcibly contend that, if that maxim (De minimis non curat lex) is to defeat a creditor with an indebtedness of over $8,000 from challenging the legality of transfers of property given to prefer other creditors for quite as large a value, **it ought also to be turned the other way, and used to expunge from the count the petty debts set up by the defendant debtor, leaving him a debtor with less than twelve creditors, and so maintaining a petition by a single creditor with an amount large enough to command respect as against the maxim.**" (Emphasis ours.)

Unless the nature and the respective amounts of the claims are to be considered by the court, then the requirement that they be set out has no meaning. Historical analysis (by reference to the cases which enforced the requirement by "case made law" prior to the Chandler Act) shows that the requirement was to avoid the abuse which ensues where small-current-account claims are used to defeat the other provisions of the Act, one of which gives a sole creditor a right to file a petition when the creditors are less than 12.

Even though the requirement to state the nature and amount was not included in the 1898 Act, yet, under that Act the prevailing practice required the nature and amount to be stated and the "case made" law excluded small-current-account claims.

Judge Trieber (D. C. Ark. 1906), in **In re Blount,** 142 Fed. 263, held that current accounts for groceries, dry

goods, drugs, laundry, rent and other necessaries for the use of the family charged during the month and customarily paid upon presentation during the first part of the succeeding month, should not be counted. He said (l. c. 269):

> "It is hardly reasonable to suppose that creditors of that kind, who feel secure in having their bills promptly paid, would want to incur the risk of losing a good customer in order to join a bona fide creditor to institute proceedings in bankruptcy. All laws must be given a reasonable construction, and for this reason the claims hereinbefore recited must be disregarded in determining the number of the creditors of Mr. Blount at the time these proceedings were instituted, and if this is done it clearly appears that there were less than 12 creditors. The fact that most of these creditors could have maintained an action and recovered judgment against Blount cannot change the rule, for a creditor whose debt is fully secured may maintain an action and recover judgment without surrendering his security, but he cannot prove his claim in bankruptcy proceedings unless he surrenders the same. The maxim 'De minimis non curat lex' may also be properly applied."

In the Blount case the total assets of the bankrupt were only $4,845.53 and, of course, the current accounts were relatively small in comparison with Luther, who lists assets at $278,500.00.

In the **Matter of Burg** (D. C. Texas, 1917), 245 Fed. 173, the claim of the petitioner was for $6,988.19, and the assets of the bankrupt amounted to $9,005.11. The bankrupt listed 25 creditors. Of these the court said (l. c. 174):

> "Only three of them were for more than $100, the highest being for $252.56, and twelve of them were for sums under five dollars. These small claims were current accounts for groceries, drugs, dry goods, milk,

> gas and oil, telegrams, telephone bills, water, light and gas bills, etc., such as are contracted and paid for from month to month. Such creditors are practically secured, as their bills have to be paid from month to month before further necessities can be obtained. The bankruptcy law is never invoked by any such small creditors, who themselves have adequate remedy for the collection of their accounts by cutting off further supplies. As to these accounts, I think the maxim 'De minimis non curat lex' applies."

In the Burg case the bankrupt was a small operator "who had been working as a clerk in an implement house". In the case at bar, the respondent lives in a residence listed as worth $20,000.00, his household furnishings as worth $4,000.00, a salary at $5,000.00 per year, to say nothing of stocks, bonds and holdings in Texas.

In the **Matter of Branche** (D. C. N. Y. 1921), 275 Fed. 555, the claim of the petitioner was $13,419.00 and total debts amounted to $16,000.00. The bankrupt listed 18 creditors, including claims for rent, nurses' bills, storage charges, drug charges and club dues. The New York Court excluded these claims as being for all intents and purposes secured, saying (l. c. 557):

> "In this case the bills referred to were contracted to be paid monthly, were secured for all intents and purposes of the Bankruptcy Law, and the creditors could refuse further credit, unless the bills complained of were paid upon specified times."

To the same effect see **W. H. Gage & Co. v. Bell** (D. C. Tenn., 1903), 124 Fed. 371, supra.

In **Security Bank and Trust Co. v. Tarlton** (D. C. Tenn., 1923), 294 Fed. 698, the Court said (l. c. 701):

> "No certain amount could well be established as to the maximum which might be claimed as a 'debt'

under such circumstances, and the relative rights of the parties must be taken into consideration in determining the question of the number of creditors."

As to preferential transfers, the Court of Appeals in **Houchin Sales Co. v. Angert** (C. C. A. 8th, 1926), 11 Fed. (2d) 115, decided under the 1898 Act, held that small amounts should be disregarded. The petitioning creditor's claim was $14,000.00. The bankrupt's assets were $13,522.26 and liabilities $17,646.57. The transfer alleged to be preferential was a payment of $50.00 on a $100.00 account. The Court said (l. c. 117):

> "The maxim, 'De minimis non curat lex', is applicable to the situation. Text-books and decisions unite in asserting the doctrine that, while the payment of money is a transfer of property under the Bankruptcy Act, it must be substantial, and not trivial, to justify a proceeding in bankruptcy on the ground of preferred payment to creditors.
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> "Loveland on Bankruptcy, pp. 310, 317, says: 'It has been held that every trivial payment is not necessarily a preference. It must be a substantial transaction to justify the institution of a proceeding in bankruptcy. It is impossible to draw a line, to say what amount is sufficient to make a preference. This depends upon the character of the payments and the intention of the debtor, and must be determined upon the facts of each particular case.' "

Cases arising under the 1898 Act, which include small claims for current accounts, are not applicable under the 1938 Act.

As shown above, many courts, under the 1898 Act, required the bankrupt to state the nature and respective amounts of his debts and excluded small claims on current accounts. This was the "case law" made prior to the Chandler Act. However, other courts, although lamenting the apparent necessity of including such claims,

nevertheless strictly following the statute, even though confessedly contrary to the spirit of the statute, included them because of the omission in the 1898 Act of any provision expressly requiring their exclusion.

Thus in **Matter of Alden** (D. C. Mass. 1924), 2 Fed. (2d) 61, the court included claims referred to as trivial because it could find no authority for excluding them, saying (l. c. 62):

> "Doubtless it would be convenient to disregard the bills of the butcher, the baker and the candlestick maker as beneath the dignity of the bankruptcy court, but I find in the act no authority for such a course."

In the **Matter of Hall** (D. C. Penn. 1928), 27 Fed. (2d) 999, the court admitted that in including small claims it acted in direct opposition to the spirit of the Act, but could find no authority to justify exclusion. It said (l. c. 1000):

> "In view of the facts developed, we have been somewhat reluctant in arriving at our conclusion that the petition must be dismissed. The dismissal seems to us to be in direct opposition to the spirit of the Bankruptcy Act, which seeks an equitable distribution of an insolvent's estate among his creditors * * * However, it is not our duty to allow the direct letter of the Bankruptcy Act to be overthrown by our conception of the spirit of that Act. Congress, in the exercise of its judgment, has determined that a petition in bankruptcy may be filed by one creditor, where the creditors number less than 12; and it has determined that where the creditors are in excess of 12 in number, 3 creditors must unite in the petition before the petition in bankruptcy is effective. It has not limited the creditors to merchandise creditors, and we find no warrant in law for the rejection of any bona fide provable claim in bankruptcy."

Neither preferred creditors nor small claims for current

accounts were expressly excluded under the 1898 Act. The reasoning which excludes the one, also excludes the other.

In any event, if any legislative expression was necessary, it was supplied by [and for the reasons given by the House Committee on the Judiciary] requiring the bankrupt to file a statement showing the "nature" and "amounts" of his debts. The purpose of this amendment, as stated by the House Committee on the Judiciary, was to adopt the "case made law," which ascertained and excluded debts for current accounts in small amounts.

The report of the Committee on the Judiciary, U. S. House of Representatives, on the Chandler Bill, shows the Committee's intention that creditors with small claims for current accounts should be excluded in computing the number of the bankrupt's creditors and the enactment by the Congress of the bill as recommended, evidences like legislative intention.

In recommending the amendment of Sec. 56c (eliminating claims of $50.00 and under, from count as to numbers at creditors' meeting), the repeal of old Sec. 55d (requiring unanimous consent to call special meeting of creditors), the amendment of 59e (adding 3 additional excluded classes), and the amendment of Sec. 59d (requiring the bankrupt to list the nature and amount of his debts), the Committee stated its intention as follows (**House Committee on the Judiciary, Report No. 1409**, pp. 14, 17, accompanying H. R. 8046 [the Chandler Bill], 75th Cong., 1st Session, July 29, 1937):

> "**Small Claims**—Section 56 c: Under this amendment claims for $50, or less will not be counted in computing the number of creditors voting or present at creditors' meetings, but are to be counted in computing the amounts. The reason for this change is that there are **usually** a large number of creditors with small claims, representing in the aggregate a comparatively small total of the bankrupt's indebted-

ness, which fall into the hands of collection agencies and others by solicitation, **with the result that the holders of such claims, with little at stake, are able to control the administration of the estate and to defeat the interests of the substantial creditors.** The adoption of this amendment will go far toward removing one of the most serious abuses of bankruptcy administration and will deprive the small creditors of no substantial rights. When it is considered that the average dividend in average bankruptcy cases is less than 10 per cent and a dividend on the $50 claim is, therefore, but $5, the justice of this amendment is readily apparent.

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"**Creditors.**—Section 55 d: **Special meeting—Small claims.**—The present provisions for special meetings of creditors is obsolete and has therefore been eliminated. As already pointed out under 'Claims' above, and for the reasons given, the claims of creditors amounting to $50 or less are not counted in computing the number of creditors, but are counted in determining the amounts.

"**Number of Creditors Joining in Petition.**—Under Section 59e relatives of the bankrupt, persons interested in a bankrupt corporation, creditors who have participated in the act of bankruptcy, fully secured creditors, and creditors who have received void or voidable preferences, liens or transfers, are not included in computing the number of creditors for the purpose of determining how many creditors must join in the petition; **and in Section 59d, where the number of creditors is less than 12, the amendment follows the authorities and is simply declarative of the case made law.**" (Emphasis ours.)

The amendments of Secs. 56c, 55d and 59d [52 Stat. 865, 866, 868, Chap. 575, Secs. 55d, 56c, and 59d, 11 U. S. C. A. 91 (d), 92 (c), 95 (d)] are in pari materia on the point of excluding small claims from computation as to number and are dealt with together. The Committee's intention as to

one amendment is relevant as to the others. The intention as to the amendments of Secs. 56c and 55d is expressly to curtail the power of small claims, and this same intention is expressed as applicable to the amendment of 59d.

The application of the intention of the Committee that small claims for current accounts should not be counted in the computation of creditors under Sec. 59d is made by **Commerce Clearing House** in its **Bankruptcy Law Service, Law Compilation,** 3rd Edition, Par. 5543, p. 4043, as follows:

> "**Small Claimants.**—The new subsection c of section 56 provides that claims of $50 or less are not to be counted in computing the number of creditors voting or present at creditors' meetings but shall be counted in computing the amount. **The reason given for this change was that small claimants with little at stake had been able to control the administration of the estate and defeat the interests of substantial creditors.** It may be that this change will effect a change in the method of computing the number of creditors for the purpose of filing a petition (59d). **At least it would seem to strengthen the position taken by some of the district courts that creditors for trivial amounts, the butcher and the baker, are not to be counted.**" (Emphasis ours.)

The amendment of 59d, the Report of the Committee on the Judiciary states, "follows the authorities and is simply declarative of the **case made law.**" (Emphasis ours.) Under the heading, "Number of Creditors Joining in Petition," and "where the number of creditors is less than 12," the Committee states creditors are to be counted according to "the case made law," and not according to arithmetical units. We have pointed out that the only "case law" made prior to the Chandler Act required the nature and amount to be stated in the bankrupt's list and on the basis of that information excluded small claims for current accounts.

The respective amounts and the nature of the 16 challenged claims require that they be excluded as small claims for current accounts in this case.

The reason Congress did not expressly include small claims for current accounts in the excluding categories of Sec. 59 (e) is obvious. The fixing of a ceiling in amount for purposes of 59 (d) is impractical because the significance of the amount is a relative matter dependent upon many considerations, including the financial status of the bankrupt, his total assets and liabilities and the amount of the claim of the petitioning creditor, and the total number of unsecured claims. A claim for a certain amount might be substantial as against a wage earner with assets of $500.00 and yet the same claim against a large corporation or against an individual with $100,000.00 in assets would be a small claim. Again, if the claim of the petitioning creditor is large, and if the value of the property alleged to have been preferentially or fraudulently transferred is large, the amount of the claims of creditors who may defeat a petition by one creditor should be substantial. It is a relative matter.

In **Security Bank & Trust Co. v. Tarlton** (D. C. Tenn., 1923), 294 Fed. 698, the petition was filed on January 18, 1923, by one creditor with a claim of $50,000.00, and the bankrupt listed 22 unsecured creditors, 14 of which had small accounts for current expenses. The Court said (l. c. 700):

> "**No certain amount could well be established as the maximum which might be claimed as a 'debt' under such circumstances, and the relative rights of the parties must be taken into consideration** in determining the question of the number of creditors. This case falls within the principle which has been announced in (citing authorities) and which is laid down as the rule to be followed in such cases by Collier: 2 Collier on Bankruptcy (13th Ed.), p. 1228 (d).

"It appears from the record that none of the parties other than petitioner is willing to proceed against the defendant in bankruptcy for various reasons, the principal one seeming to be that he has been a good customer, and this case affords a striking illustration of the soundness of the principle above stated for determining who are 'creditors' within the meaning of the Bankruptcy Act. To hold otherwise would be to say that defendant, with many thousands of dollars of valuable property as disclosed by the record, could so transfer his property as to secure his favored few, leave a few small and comparatively insignificant claims due certain of his friends, who, for the amount involved, would not be willing to institute or join in bankruptcy proceedings, and thus leave plaintiff with his large indebtedness wholly without remedy (assuming that no fraud entered into the transfers made by defendant to those whose debts he attempted to secure, and no fraud appears from the record as now presented). **Plaintiff would thus be without remedy.** Justice never contemplated that such an advantage should be given, nor does the law permit it." (Emphasis ours.)

The Court of Appeals in **Houchin Sales Co. v. Angert** (C. C. A. 8th, 1926), 11 Fed. (2d) 115, l. c. 117, said:

"The nature of the business transacted and the facts and circumstances of each particular case are important to be considered in determining such question."

There was really no necessity for the Act of 1938, under which this case arises, to expressly include small current accounts in the excluding categories in Sec. 59 (e), because such claims had previously been excluded under the "De minimis" rule, and as being practically secured.

Current accounts for ordinary living expenses are customarily paid monthly. They vary in amount according to the economic or financial status of the debtor. They rarely appear in any schedules, except of debtors in the lower financial brackets.

The respondent lists his assets at $278,500.00. He has passed the quarter-million dollar station in life. These 16 small creditors living about him in Chillicothe hold current accounts for living expenses. He had customarily paid them monthly as is evidenced by the fact that practically all these unpaid bills are July, 1944, bills. They were not due and payable till after the petition was filed. For all intents and purposes they are secured creditors, expressly excluded under Sec. 59 (e) (4). Of course, they would never join in an involuntary petition in bankruptcy.

Sec. 59 (b) expressly gives a single creditor the right to file a petition, if the creditors are less than 12. If such creditors as these are to be counted, then obviously Sec. 59 (b) grants an illusory and not a substantial right. It is made illusory by the fact recognized by the House Committee on the Judiciary (**House Committee on the Judiciary, Report No. 1409**, p. 14, accompanying H. R. 8046 [Chandler Bill], 75th Congress, 1st Session, July 29, 1937), "that there are **usually** a large number of creditors with small claims, representing in the aggregate a comparatively small total of the bankrupt's indebtedness, * * *." (Emphasis ours.)

The holding by the Court of Appeals that the respondent's small-claim creditors for current accounts should be counted, thereby preventing the Committee from maintaining this proceeding, and permitting the bankrupt, as here, to use the holders of small claims for current accounts with little at stake to defeat the interest of a substantial creditor, is erroneous on the ground that it violates, if not the letter, certainly the spirit of the 1938 Amendment (Chandler Act).

There are "**usually**" a large number of creditors with small claims for current accounts. This fact was recognized and stated by the House Committee on the Judiciary as we have heretofore pointed out. It follows, if the Bank-

rupt's small-claim creditors for current accounts are to be counted, that the bankrupt **usually** would enjoy complete immunity to an involuntary bankruptcy petition filed by a single creditor.

The rule of statutory construction according to the spirit of the Chandler Act is important here, where otherwise absurdity or injustice would result. In **Fleischmann Construction Co. v. United States** (1926), 270 U. S. 349, l. c. 360, 46 S. Ct. 284, l. c. 289, 70 L. Ed. 624, l. c. 631, this Court said: "The strict letter of an Act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. * * * And unjust or absurd consequences are, if possible, to be avoided"; in **Holy Trinity Church v. United States** (1892), 143 U. S. 457, l. c. 459, 12 S. Ct. 511, 36 L. Ed. 226, l. c. 228, this Court said: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application"; in **Stevens v. Nave-McCord Mercantile Co.** (C. C. A. 8th, 1906), 150 Fed. 71, l. c. 75, supra, the Court of Appeals said: "* * * the statute must be given a rational, sensible construction; * * *"; and in **59 C. J., Statutes 964, Sec. 573,** the rule is thus stated: "In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute, although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute. Effect will be given the real intention even though contrary to the letter of the law."

II.

QUESTION ONE, POINT II.

Small claims are not to be included under the rule, "Expressio unius est exclusio alterius," because not included in Sec. 59 (e). The contrary holding of the Court of Appeals is in conflict with decisions of the First and Tenth Circuits on the same matter.

The Act of 1898 [30 Stat. 561, 562, Chap. 541, Sec. 59 (e), 11 U. S. C. A., Sec. 95 (e)], in the computation of the number of the bankrupt's creditors, expressly excluded [Sec. 59 (e)] only: 1) Employees of the bankrupt, and 2) relatives of the bankrupt. The Chandler Act of 1938 [52 Stat. 868, 869, Chap. 575, Sec. 59 (e), 11 U. S. C. A., Sec. 95 (e)], added 3 additional excluded classes: 3) Creditors who participated in the alleged acts of bankruptcy, 4) secured creditors, and 5) preferred creditors.

Before the additional 3 excluded classes were expressly added in 1938 [Chandler Act of 1938, Sec. 59 (e), 11 U. S. C. A., Sec. 95 (e)], it was argued that since the Act of 1898 expressly excluded only the 2 classes, no other classes could be excluded under the rule of "Expressio unius est exclusio alterius." However, other Circuit Courts of Appeals, prior to the 1938 Act, excluded other classes, because of the manifest unfairness to the petitioning creditor resulting from their inclusion, and refused to apply the maxim. It was so held in the following cases:

> **Myron M. Navison Shoe Co., Inc., v. Lane Shoe Co.** (C. C. A. 1st, 1929), 36 Fed. (2d) 454, l. c. 457;
> **International Shoe Co. v. Smith-Cole, Inc.** (C. C. A. 10th, 1933), 62 Fed. (2d) 972, l. c. 974;
> **Leighton v. Kennedy** (C. C. A. 1st, 1904), 129 Fed. 737, l. c. 739.

III.

QUESTION ONE, POINT III.

The decision of the Court of Appeals including in the count unsubstantial claims is in conflict with the First Circuit Court of Appeals on the same matter in Leighton v. Kennedy (1st C. C. A., 1904), 129 Fed. 737, l. c. 740.

In the Leighton case, supra, the First Circuit, referring to "Eight claims against said Leighton, aggregating less than $200.00" (l. c. 739), held that such claims "were unsubstantial, and not cognizable in bankruptcy proceedings, which, as we have several times held, are governed by equitable principles" (l. c. 740).

IV.

QUESTION ONE, POINT IV.

Proper administration of the Bankruptcy Act warrants this Court in settling this important question.

The institution of unauthorized proceedings should be avoided. A creditor should know whether he alone may institute a proceeding or whether two other creditors must join with him. Until the creditor knows whether his debtor's small-current-account creditors are to be counted he, in a case where the debtor has few creditors, can not determine whether he alone can maintain the proceeding. If holders of these claims described by the Referee (R. 54) as "similar to the usual monthly bills that any head of a family would normally incur" are to be counted, then whether the total is less than 12 becomes useless, a count of creditors becomes futile, and the exclusion of employees and relatives becomes fruitless. In a count, why bother to exclude the participants in the acts of bankruptcy if the barber's current bill for $10.00 and the grocer's for $6.00 are to be included? The exclusion of

preferred creditors and secured creditors is nullified by the inclusion of the current telephone and dry cleaning bills. The right given a sole creditor in Sec. 59 (b), the elaborate procedure set up in Sec. 59 (d) for determining the total number of creditors, and the well-founded exclusions enumerated in Sec. 59 (e) are not to be frittered away by including small current accounts "that any head of a family would normally incur." Such claims are too small for the law's protection. They are for all intents and purposes secured claims excluded under Sec. 59 (e) (4). The spirit of the Chandler Act forbids their inclusion.

Until this Court settles this question the right of a sole petitioner under Sec. 59 (b) is fraught with such peril from these small-current-account creditors "**usually**" present as to be practically unavailable, and the counting of creditors under 59 (d) and (e) is futile.

B. ARGUMENT AS TO SECOND QUESTION PRESENTED.

QUESTION TWO, POINT I.

Respondent Was Fraudulent to Interveners in Accepting Money for a Non-Existent Contract.

(a) **Respondent's fraudulent conduct.**

Respondent's fraud went to the substance of the transaction, as pointed out above in our statement of the case, and because of that, interveners are entitled to restitution as in all other cases where a person pays money in misreliance upon the existence of a valid contract. This is not a case where there is a mere misrepresentation as to the price which the principal would be willing to take, although respondent did make a misrepresentation as to such price. It is similar to the case of **McClure v. H. R. Ennis R. E. & Inv. Co.** (1925), 219 Mo. App. 112, 268 S. W. 675, where the name of a straw buyer was inserted

by the agent in place of the real seller and where the court held that irrespective of other issues and irrespective of loss to the purchaser, the latter was entitled to the return of the deposit which he had made. The Court said (219 Mo. App., l. c. 120) that the misrepresentations were "the very foundation of the action. Can we say, then, that these representations, if proved, were immaterial? We think not." As in that case, there is no possibility of dealing with respondent's misrepresentation as mere sellers' talk.

Even in cases where the agent has misrepresented the price which the principal is willing to receive, the better reasoned cases and more importantly, the Supreme Court of Missouri, hold that such statements are not merely sellers' talk but are actionable misrepresentations for which the agent is liable to the buyer. We will deal with these cases, not because we believe they are determinative but because we believe that even in such cases the weight of authority is strongly in favor of allowing recovery by the third person.

We mention first what we regard as the determinative case because it was decided by the Supreme Court of Missouri, where the transaction occurred.

In **Hays v. Smith,** 213 S. W. 451 (Mo. Supreme Court, 1919), the question raised was whether the statement by the agent as to the seller's price was made with or without the knowledge of the seller. It was alleged that the agent had stated the seller's price to be $75.00 per acre, when in fact it was $50.00 per acre, as the agent knew. The question was whether the judge was correct in stating that the issue was whether the agent had represented the price fixed by the principal at $75.00 per acre "with the knowledge and consent of" the principal. The Court held that this was the important issue since it would determine whether or not the agent was guilty of deceit. This case holds that an agent's misrepresentations as to price with-

out the knowledge and consent of the seller are actionable. This case overrules in substance the previous Missouri Appeals case of **McLennan v. Investment Exchange Company** (1913), 170 Mo. App. 389, 156 S. W. 730, a case which was also in part erroneously decided on the ground that the fraudulent agent is not liable to a third person. This latter point has been decided adversely to the **McLennan** case in **Hack v. Crain** (Mo. Sup. 1915), 177 S. W. 587, which has universal support.

The Missouri rule is supported by a long line of authority: **Lear v. Bawden** (1924), 75 Colo. 385, 387, 225 Pac. 831 (the agent was held liable for a simple misrepresentation as to the principal's asking price); **Bigger v. Hollworth** (1921), 69 Colo. 451, 194 Pac. 940; **Dunshee v. Novotny** (1925), 77 Colo. 6, 233 Pac. 1114; **Kilgore v. Bruce** (1896), 166 Mass. 136, 138, 44 N. E. 108, 109 (not directly in point but a case where the fact that the subject matter was worth the price paid, held not to exonerate the agent); **Isenbeck v. Burroughs** (1914), 217 Mass. 537, 539, 105 N. E. 595, 596 (where the agent misrepresented the seller's lowest price, the Court held that the agent was liable to the purchaser for the difference between the seller's price and the price the agent represented); **Hokanson v. Oatman** (1911), 165 Mich. 512, 517, 131 N. W. 111, 113 (where the buyer was allowed an action for the difference in price between the amount stated by the agent and the amount specified by the principal); **Stevens v. Reilly** (1916), 56 Okla. 455, 462, 156 Pac. 157, 159 (a similar result, the Court allowing recovery for the difference between the price specified and that represented by the agent); **Cook v. Skinner** (1908), 50 Wash. 317, 319, 97 Pac. 234, 235 (another case of assumpsit where the agent was made to surrender to the purchaser the amount he had profited from the fraud); **Collins v. Philadelphia Oil Co.** (1924), 97 W. Va. 464, 470, 125 S. E. 223, 225 (where the Court

vigorously denied that the doctrine of caveat emptor should shield an agent who had defrauded a buyer by misrepresenting the seller's asking price; the Court said [97 W. Va., l. c. 469]: "We do not consider that the doctrine of caveat emptor either now or ever has been a complete shield to all sorts of false bargaining"); and **Estes v. Crosby** (1920), 171 Wis. 73, 79, 175 N. W. 933, 935 (representing settled Wisconsin view as brought out in the next two cases); **Booker v. Pelkey** (1920), 173 Wis. 24, 180 N. W. 132; and **Rimling v. Scherper** (1932), 206 Wis. 532, 240 N. W. 159. See, also, **2 Restatement of the Law of Agency,** Sec. 348, Comment (d), p. 763, and **Reporter's Notes, Appendix to Tentative Draft No. 6, Restatement of Agency,** pp. 195-197, incl.

There was no contract.

Since the intervener's offer was not communicated, of course it could not have been accepted and it was not accepted. An intentionally different purported offer was presented by respondent to the Committee and this was accepted by it in the mistaken belief that it was a real offer.

This represents the type of case where the minds of the parties have not met and where it is universally held that there is no contract.

A case involving substantially the same issue is that of **Vickrey v. Ritchie** (1909), 202 Mass. 247, 88 N. E. 835. Here in a building contract the architect presented to the contractor a document signed by the landowner in which the price appeared as $33,731. He presented to the landowner a document signed by the contractor in which the price appeared as $23,200. The fraud was not discovered until the building was nearly completed. The Court held (202 Mass., l. c. 249, 250): "The plaintiff and defendant were mistaken in supposing that they had made a binding

contract for the construction of this building. Their minds never met in any agreement about the price. * * * Their mutual mistake in this particular left them with no express contract by which their rights and liabilities could be determined. * * * Through the mistake of both parties there was no agreement, and that which was thought to be a valuable consideration failed." The Court refused to allow an action on the contract, but permitted one of quasi contract because of the unjust enrichment which would result if the owner of the land were not required to pay for the value of the building erected upon it. See, also, **Dock Contractor Co. v. Niagara Falls Power Co.** (D. C. N. Y., 1921), 274 Fed. 852, l. c. 855.

This is universal law.

McClure v. H. R. Ennis R. E. & Inv. Co. (1925), 219 Mo. App. 112, 268 S. W. 675. Here a contract as signed by the plaintiff to purchase from J. Q. Watkins was changed to one in which the sellers appeared to be Watkins and Harner. The Court held (219 Mo. App., l. c. 120): "On the question of alterations in the contract we hold that defendant's contention that, since said changes were in plaintiff's favor there could be no valid objection to them, is untenable. * * * It was held by the Supreme Court in Carson v. Woods, 177 S. W. 623: "The smallest material change in a written instrument will invalidate it, without regard to the intent with which the change is made."

See also: **Nelson v. Rohweder** (1920), 147 Minn. 325, l. c. 328, 180 N. W. 223, l. c. 225.

In 6 **Williston on Contracts** (Revised Edition, 1938), p. 5352, Sec. 1913, the author states:

> "In some cases, however, a writing is altered before it has become a binding contract by delivery or assent. * * * the * * * question may arise in any case where a writing is intrusted to an agent to deliver and it is altered before delivery. * * * so long as it

> (the alteration) is material, a non-assenting obligor cannot be held. **He cannot be held on the obligation in its altered form, because he never made or assented to such an obligation. He cannot be held on the obligation in its original form, because that obligation was never delivered or assented to by the creditor.''** (Emphasis ours.)

See, also, 2 **C. J., Alteration of Instruments**, 1224, Sec. 91, where the rule is stated:

> "But where an instrument has been signed by one party with the understanding that the other party is also to sign it, and it is materially altered and signed by the latter in its altered form, it does not become binding on the one who first signed it * * *."

The spurious contracts were void on the ground of forgery. 2 **C. J. S., Agency,** Sec. 37, p. 1076; **Broughton Bros. v. Sumner** (1899), 80 Mo. App. 386, l. c. 388; **Kelchner v. Morris** (1898), 75 Mo. App. 588, l. c. 593; **Ferry v. Taylor** (1863), 33 Mo. 323, l. c. 334.

The Fact That Respondent Became Subject to Liability for a Breach of Fiduciary Duty to His Principal and Was Still Liable to His Principal for Such Breach, Does Not Make Him Less Liable to the Interveners.

That a fraudulent person cannot be relieved from liability because he is responsible to some one else for his fraud is obvious, and the courts have consistently held that an agent who is personally fraudulent in the acquisition of money, whether or not for his own or for his principal's benefit, is liable to the person from whom he obtained it, whether or not he has paid over to the principal the amount that he improperly received.

In **Hack v. Crain** (Mo. Sup., 1915), 177 S. W. 587, Crain,

the defendant, a real estate broker, engaged by one Goodspeed to sell the latter's land at $1600, falsely **represented** to Hack, the plaintiff, that the land was worth $900 in excess of the vendor's sale price, and induced plaintiff to buy at such price of $2500, pocketing the $900 difference. The plaintiff's action was in equity, not "in tort for fraud or deceit." The defendant's defense was an **attempted** application of the agency-accounting rule (identically the same as actually applied here by the Court of Appeals), namely, because the dishonest agent was "bound to account" to his principal "for all that he had actually obtained" from the purchaser, the defrauded purchaser had no right of action for the excess amount fraudulently extracted by the agent. The Missouri Supreme Court held the agency-accounting rule inapplicable, and the defense based thereon without merit. It held the agent was guilty of fraud, **actionable in equity**, and plaintiff was decreed recovery of the excess amount of $900 from the defendant, **notwithstanding that the defendant sold the land in the capacity of an agent.** The decree cancelled a $500 balance on a mortgage note, and gave a money judgment for $400, aggregating the $900 extortion.

The decision is on all fours and applicable here and the decision of the Court of Appeals is squarely in conflict therewith. The Court said (l. c. 589):

> "Counsel for defendant insist that, under the pleadings and evidence in this case, the defendant was the agent of Goodspeed, the vendor of the land, and not that of the plaintiff, the vendee, in the sale thereof, and consequently whatever fraud was perpetrated by him in the transaction was to the damage of the former, and not to the defendant, the vendee, and therefore plaintiff was not entitled to the relief prayed for in this bill.
>
> "In our opinion, Counsel for the defendant has clearly misconceived the character of the cause of

> action charged in the bill. * * * The petition proceeds upon the theory that plaintiff was ignorant of the character of the soil and the value of the land purchased, and that defendant knew those facts, and that, after plaintiff informed defendant thereof and told him that he was going to rely upon his judgment as to the character and value of the land, then, under the facts and circumstances stated in the petition, which were fully proven by the evidence, the conduct of the defendant clearly constituted such a deception and fraud upon the plaintiff as to entitle him to the relief prayed, **regardless of the question as to whether or not he had also perpetrated a fraud upon the vendor of the land."** (Emphasis ours.)

In **Patzman v. Howey**, 340 Mo. 11, 22, 100 S. W. (2d) 851, 856, the controlling local rule is thus stated:

> " 'When an officer or agent of a corporation by fraud procures the money of a third person while acting for the corporation, he cannot escape liability therefor by paying over the money to the corporation.' [7 R. C. L. 507, Sec. 489; Bank of Atchison Co. v. Byers, 139 Mo. 627, 41 S. W. 325; Hoffman v. Toft (Ore.), 142 Pac. 365, 52 L. R. A. (N. S.) 944, Ann. Cas. 1912 D, 721, note.]"

To the same effect, **Tillman v. Bungenstock** (1914), 185 Mo. A. 66, l. c. 68, 171 S. W. 938, l. c. 939.

The rule is supported by a long line of authority: **Bocchino v. Cook** (1902), 67 N. J. L. 467, 468, 51 Atl. 487; **Phetteplace v. Bucklin** (1893), 18 R. I. 297, 300, 27 Atl. 211, 212; **Moore v. Shields** (1889), 121 Ind. 267, 273, 23 N. E. 89, 91; **Hardy v. American Export Co.** (1902), 182 Mass. 328, 329, 65 N. E. 375, 376, 59 L. R. A. 731, 732; **Alexander v. Coyne** (1915), 143 Ga. 696, 698, 85 S. E. 831, 832, L. R. A. 1916 D, 1039, 1041, and **Hoining v. Federal Reserve Bank** (C. C. A. 8th, 1931), 52 Fed. (2d) 382, 387, 82 A. L. R. 297.

In **3 C. J. S., Agency**, page 129, Sec. 220, it is said: "An agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity or by authority or direction of another, and whether acting for himself or on behalf of another, he is personally liable for torts committed by him." This is universally accepted. See **2 Restatement of Law of Agency**, Sec. 348, p. 760, and cases cited in **Note in 82 A. L. R. 312** (1933).

In **Peterson v. McManus** (1919), 187 Ia. 522, l. c. 547, 172 N. W. 460, l. c. 469, where the plaintiff sought to recover property obtained by a fraudulent agent and transferred to his principal, it is stated: "If his (the agent's) fraud deprived the plaintiff of property, that fact alone supports a judgment that McManus (the agent) restore the property." In **Inland Waterways Corp. v. Hardee** (App's. Dis't. Col. 1938), 100 Fed. (2d) 678, l. c. 685, the Court in imposing liability upon the agent which had improperly received money for his principal, even though he had turned the money over to the principal, in this case the United States, stated: "An agent is not excused from liability for his torts because he acted only as an agent, whoever his principal may be."

Interveners Have Alternative Rights to Sue in Tort or in Quasi Contract. This Proceeding Is for the Enforcement of the Quasi Contractual Claim and Not a Claim for Tort Damages.

The distinction between an action of tort and an action of quasi contract or its modern name, an action of restitution, is well defined. The action of quasi contract is based upon the unjust enrichment which occurs when a person has improperly received property or money from another and is not entitled to retain it. Plaintiff has alternative remedies either to sue for the wrong that has been done him or to require what in substance amounts to

a rescission of the transaction by getting back from the tortfeasor the amount by which the tortfeasor has been benefited by his tort. The plaintiff is not seeking damages for the wrong and is not allowed to recover damages merely because he has been injured. He is allowed to recover the amount by which the tortfeasor has been enriched. See **Restatement of Restitution, Introductory Note to Chapter 7, page 522.**

This alternative action has been recognized where an agent has misrepresented the amount which his principal would take and where the Court has allowed recovery for the amount improperly received by the agent. This was true in **McClure v. H. R. Ennis R. E. Inv. Co.** (1925), 219 Mo. App. 112, 268 S. W. 675; in **Isenbeck v. Burroughs** (1914), 217 Mass. 537, 105 N. E. 595; **Hokanson v. Oatman** (1911), 165 Mich. 512, 131 N. W. 111; and **Cook v. Skinner** (1908), 50 Wash. 317, 97 Pac. 234. This alternative action has also been recognized in the line of decisions of this Court headed by **Crawford v. Burke** (1904), 195 U. S. 176, 25 S. Ct. 9, 49 L. Ed. 147, which hold that such a debt is provable against the bankrupt's estate, though the creditor never elects to waive the tort.

In **Clifford Banking Co. v. Donovan Commission Co.** (1906), 195 Mo. 262, 288, 94 S. W. 527, 535, the Court held:

> "The action for money had and received has always been one favored in the law and the tendency is to widen its scope—it being a flexible form of action, levying tribute in equitable, as well as strictly legal doctrines; so that it has become axiomatic that the action lies where 'the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff.'
>
> "On principle there is no reason apparent to us why a constructive trust in favor of respondent does

not exist in this case under the rule announced by Mr. Perry (1 Perry on Trusts [5 Ed.], Sec. 211), as follows: 'So property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured; or, as Lord Ch. Justice Wilmot said, "Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it" ' "

* * * * * * *

"**Nor can we see any good reason why in this form of action, where the petition partakes of the nature of a bill of equity, the action may not lie to reach money held under a constructive trust.**" (Emphasis ours.)

In **Restatement, Restitution,** 673, Sec. 166, the applicable general rule is thus stated:

"Where one person acquires title to chattels or to money from another by fraud, he holds the chattels or money upon a constructive trust for the defrauded person. * * * Whether or not the chattels or money are still held by the wrongdoer, **the defrauded person can maintain against the wrongdoer a quasi-contractual action** (see Sec. 130) or an action of tort for deceit or for conversion." (Emphasis ours.)

Also supporting the rule are **Hack v. Crain** (Mo. Sup., 1915), 177 S. W. 587, 589, and **Webster v. Sterling Finance Co.,** 351 Mo. 754, 757, 173 S. W. (2d) 928, 931.

The Basis of Quasi Contractual Relief Is the Amount of Unjust Enrichment.

The difference between an action of tort, where the accent is upon the damage suffered by the defendant, and the action for restitution, where the accent is upon the

amount improperly received, is crucial in this action. This proceeding was not brought for the damage which interveners have suffered but the amount by which the respondent has been unjustly enriched. In these proceedings it is, therefore, not essential that the interveners should establish that they have suffered financial loss. It is sufficient that the respondent has received their money, to which because of his fraud, he was not entitled. This point of view is perhaps best expressed in the case of **Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc.** (S. D. N. Y. 1920), 268 Fed. 575, where the action was for wrongful interference by the defendant with the plaintiff's contract with the Norwegian Government. The defendant had made a similar contract with the Norwegian Government and had acquired a large profit thereby. The defendant complained that the plaintiff had not proved damage but the court, recognizing that the plaintiff had "waived the tort" and was suing in assumpsit for money had and received, permitted recovery by the plaintiff, stating (l. c. 582, 583): "The point is not whether a definite something has been taken away from plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched. * * * It is further urged that, unless plaintiff has been actually damaged, it has no grievance, and that the complaint should have alleged ability profitably to perform plaintiff's contract with the Norwegian Commission. This position misconceives the nature of an action for money had and received as framed in this complaint. * * * The action is not for damages for breach of contract, but for the profit which defendant is alleged to have made as the result of its alleged wrongful acts. Ability to perform, in such circumstances, is no part of

plaintiff's case. **Angle** case, supra, 151 U. S. 12, 14 S. Ct. 240, 38 L. Ed. 55."

For other cases which recognize this point of view see **Caskie v. Philadelphia Rapid Transit Company** (1936), 321 Pa. 157, 184 Atl. 17, 106 A. L. R. 318, where the Court stated [321 Pa., l. c. 163]: "Recovery has not been limited to cases in which something has been taken from plaintiff's pocket"; and **Second National Bank of Toledo v. M. Samuel & Sons** (C. C. A. 2d Cir., 1926), 12 Fed. (2d) 963, 53 A. L. R. 49, where the Court held that defendant had received a benefit which it was unjust for him to retain, and this benefit, on account of the tort which defendant had committed, should be paid to the plaintiff who was in equity entitled to it. The Court deemed it unnecessary to consider either whether the benefit was derived at the plaintiff's expense, or the fact that the plaintiff had complete indemnification by contract action against either the bank issuing the letter of credit or the vendor who had transferred the draft. See, also, "Diminution of Plaintiff's Estate as an Essential of Unjust Enrichment in an Action at Law" in 22 **Virginia Law Review**, page 683, et seq.

The rule that one who has been unjustly enriched is responsible to another from whom he has improperly obtained property is brought out in a wide variety of cases. See **Thurston, Cases on Restitution** (1940), footnotes on pp. 77, 78, 79, 82, 83. This is particularly clear in cases where one who is not entitled to receive payment on a debt is sued by the obligee, in which case the one so receiving the money is liable to the rightful owner of the claim, although the latter still has his claim against the obligor. For this see **Heywood v. Northern Assurance Co.** (1916), 133 Minn. 360, 158 N. W. 632, Ann. Cas. 1918 D, 241; **Bates-Farley Sav. Bank v. Dismukes** (1899), 107 Ga. 212, 33 S. E. 175; and **Bosworth v. Wolfe** (1928), 146 Wash. 615, 264 Pac. 413, 56 A. L. R. 1117. The same principle

is applied to patent infringement cases where the recovery is based not upon the harm to the plaintiff by the infringement of the patent but the profits received by the infringer. See **Duplate Corp. v. Triplex Safety Glass Co.** (1936), 298 U. S. 448, l. c. 457, 56 S. Ct. 792, l. c. 796, 80 L. Ed. 1274, l. c. 1281, where this Court held, "The wrongdoer must yield the gains begotten of his wrong." See, also, **Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.** (1916), 240 U. S. 251, l. c. 259, 36 S. Ct. 269, l. c. 272, 60 L. Ed. 629, l. c. 634 (infringement of trade-mark), where this Court held, "* * * profits are * * * allowed as an equitable measure of compensation, on the theory of a trust ex maleficio."

In **First National Bank v. Produce Exchange Bank** (1935), 338 Mo. 91, 98, 99, 89 S. W. (2d) 33, 38, the plaintiff sued a collecting bank in an action for money had and received for the value of cashier's checks collected on forged endorsements. Recovery was allowed notwithstanding the plaintiff was reimbursed for its loss by an insurance company. The Court said:

> "In next to the last paragraph of the opinion filed we intended to answer the question, Can plaintiff recover, not having pleaded nor shown any loss? by adopting what Judge Trimble said on this question in his dissenting opinion, but, perhaps, we did not make ourselves clear. In addition to what we quoted, which we think is pertinent, Judge Trimble, in his dissenting opinion [227 Mo. App. 908, 59 S. W. (2d) 81, page 87] said: 'It is urged that plaintiff cannot recover because it has "suffered no loss." * * * **The suit is not one for damages but to recover money the defendant bank had and received**, but to which it never had title and for which it gave plaintiff no consideration. The plaintiff, the moment it paid out the money on the forged indorsements, had a cause of action against defendant, which arose immediately. **The suit**

is to recover the money, and is not dependent upon whether a loss will eventually accrue to plaintiff, * * *.' " (Emphasis ours.)

II.

QUESTION TWO, POINT II.

In Holding That Interveners May Not Elect to Claim for Money Had and Received—Under the Implied Contract Clause of Section 63 (a) (4) of the Bankruptcy Act—the Court of Appeals Has Rendered a Decision in Conflict With the Decision of Another Circuit Court of Appeals and With an Applicable Decision of This Court on the Same Matter.

In **In re International Match Corp.** (C. C. A. 2d, 1934), 69 Fed. (2d) 73, the proof of claim was in quasi contract, and its gravamen was that the bankrupt had wrongfully pledged stock of the appellant, Swedish Match Co. It appeared that appellant had brought suit in a state court against the pledgee and others claiming damages for conversion of the stock. The Referee expunged the claim on the motion of the trustee in bankruptcy, Irving Trust Co., which order was confirmed by the District Court. The Court of Appeals of the Second Circuit held the claim allowable as a valid claim in quasi contract for unjust enrichment. It said (l. c. 75):

> "The trustee argues that the pendency of the state suit for conversion is a bar to proving in bankruptcy on the theory of quasi contract; that without waiver of the tort no provable claim can arise. Upon this ground the court below held the claim nonprovable. As we read the Supreme Court decisions, the claimant in bankruptcy is not forbidden to take inconsistent positions. Although he has sued in tort for conversion, he has a claim provable and hence dischargeable in bankruptcy (Crawford v. Burke, 195 U. S. 176, 193,

25 S. Ct. 9, 49 L. Ed. 147); and although he has proved in bankruptcy on the implied contract, he may later sue for fraud, an even more obvious inconsistency (Friend v. Talcott, 228 U. S. 27, 37-39, 33 S. Ct. 505, 57 L. Ed. 718). See, also, In re Menzin, 238 F. 773 (C. C. A. 2). As we understand the law, the doctrine of election of remedies between tort and quasi contract has no application to proofs of claim in bankruptcy. **If the facts show an unjust enrichment of the bankrupt, the claim is provable,** even though a prior suit for conversion is pending. Crawford v. Burke, supra." (Emphasis ours.)

In **Crawford v. Burke** (1904), 195 U. S. 176, 25 S. Ct. 9, 49 L. Ed. 147, the Court held that such a debt is provable against the bankrupt's estate, though the creditor **never** elects to waive the tort. This was an action for trover instituted in the Circuit Court of Cook County, Illinois, by Burke against Crawford and Valentine, plaintiffs in error, to recover damages for the wilful and fraudulent conversion of the interests of the plaintiff in certain shares of stock. There were ten counts in the declaration, five charging fraudulent conversion of that stock, and five the obtaining of money from plaintiff in the way of margins by means of false and fraudulent representations. Defendants pleaded their discharge in bankruptcy, but were found liable on all the counts, and judgment was entered against them, which was affirmed by the Appellate Court and by the Supreme Court of Illinois. In reversing the State courts and holding that plaintiff's claim was discharged because it was "provable under the Bankruptcy Act," that is, it was **"susceptible of being proved"** (195 U. S., l. c. 186) under Section 63a as "founded upon * * * a contract express or implied," the Court said (195 U. S., l. c. 193, 194):

"If no fraud could be made the basis of a provable debt, why were certain frauds excepted from the oper-

ation of a discharge? We are, therefore, of opinion that if a debt originates or is 'founded upon an open account or upon a contract, express or implied,' it is provable against the bankrupt's estate * * *. It certainly would not have been the intention of Congress to extend the operation of the discharge under Section 17 to debts that were not provable under Section 63a.

"For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy."

III.

QUESTION TWO, POINT III.

Where, as Here, Respondent Was the Sole Actor, the Committee Could Claim Title to the Unjust Enrichment Extracted From the Interveners Only by Virtue of the Sole Actor's Fraud Upon Them, and Had the Agent Accounted to the Committee for the Money, It Would Have Come to the Committee Burdened With Respondent's Knowledge of the Defect in Title. The Court of Appeals in Holding to the Contrary Has Rendered a Decision in Conflict With the Decisions of the 2nd, 5th, 7th and 10th Circuit Courts of Appeals, With Applicable Decisions of This Court, and With Applicable Local Decision, on the Same Matter.

In **Munroe v. Harriman** (C. C. A. 2nd, 1936), 85 Fed. (2d) 493, 495, 111 A. L. R. 657, Plaintiff brought a bill in equity to rescind a loan of securities by him to Joseph W. Harriman and to recover the securities from Harriman National Bank and Trust Co., to which Harriman had pledged them. The lending of the securities was procured

by fraud, which concededly gave ground for rescission of the transaction as against Harriman. The question was whether Harriman's knowledge of his fraud upon Munroe, the plaintiff, and of the latter's resulting equitable claim to recover possession of the borrowed stock, was, as a matter of law, imputed to the bank, when it accepted the pledge of the stock from Harriman's dummy corporation.

The Court said:

> "The rules for determining when an agent's knowledge will or will not be imputed to his principal are frequently stated in terms of presumptions. Thus, in Distilled Spirits, 11 Wall. 356, 367, 20 L. Ed. 167, Justice Bradley said that it is the agent's duty to communicate the knowledge he has concerning the subject of negotiation and there is a presumption that he will perform that duty. * * * The rational explanation of the Distilled Spirits case is that common justice requires that one who puts forward an agent to do his business should not escape the consequences of notice to, or knowledge of, his agent. * * * But the general rule is subject to equally well established exceptions * * *, one of which is that an agent's knowledge is not imputed when he is acting adversely to his principal * * *. The real basis for this exception was stated by Judge Taft in Thompson-Houston Electric Co. v. Capital Electric Co., 65 F. 341, 343 (C. C. A. 6): 'The truth is that where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it.' **But the injustice disappears if the principal adopts the unauthorized act of his agent in order to retain a benefit for himself.** Thus in Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215, 43 S. Ct. 570, 67 L. Ed. 956, an agent employed to procure title to land, contrary to instructions procured it with knowledge of a fraud practiced on the

owner. Although the agent had an interest adverse to his principal to conceal the defect in title because his own profits would increase with the number of titles procured, his knowledge was imputed to the principal. He was the sole actor for the corporate principal in procuring the fraudulent patents. **In such a case the principal is impaled on the horns of a dilemma. If he disclaims the agent's acceptance of the property for him as unauthorized, he has no ground to retain it; on the other hand, if he retains the property, he adopts the agent's act in procuring it and must in fairness take the accompanying burden of the agent's knowledge.** See Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 634, 20 S. Ct. 498, 44 L. Ed. 611; * * *.

* * * * * * *

"In such case, as already pointed out, the corporation can claim title only by virtue of the sole actor's act and must accept it burdened with his knowledge of the defect in title.

"It would prolong this opinion unduly to discuss all of the cases cited by opposing counsel. It may be admitted that they cannot all be reconciled, but **there is substantial authority in support of the 'sole actor' doctrine. For reasons already stated we think it is sound."** (Emphasis ours.)

The decision of the Court of Appeals that the principal is entitled to the proceeds of the fraud perpetrated by respondent on the interveners is also in conflict with the following decisions of the Fifth, Seventh and Tenth Circuit Courts of Appeals on the same matter:

Connecticut Fire Ins. Co. v. Commercial Nat. Bank (C. C. A. 5th, 1937), 87 Fed. (2d) 968, 969;

Bosworth v. Maryland Casualty Co. (C. C. A. 7th, 1935), 74 Fed. (2d) 519;

Queenan v. Mays (C. C. A. 10th, 1937), 90 Fed. (2d) 525, 530.

The decision of the Court of Appeals is also in conflict with the following applicable decisions of this Court:

Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215, 43 S. Ct. 570, 67 L. Ed. 956;
Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 634, 20 S. Ct. 498, 44 L. Ed. 611.

It is also in conflict with the following applicable local decision:

Clifford Banking Co. v. Donovan Commission Co. (1906), 195 Mo. 262, 288, 94 S. W. 527, 535,

where it is held that "If such person accepts the property, he adopts the means by which it was procured; or, as Lord Ch. Justice Wilmot said, 'Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it.'"

C. ARGUMENT AS TO THIRD QUESTION PRESENTED.

In Order to Avoid Confusion in the Administration of the Bankruptcy Act, This Court Should Settle Whether Local Law or Federal Law Is Controlling in Determining the Provability of Interveners' Claims.

In **Erie Railroad Co. v. Tompkins,** 304 U. S. 64, 78, 58 S. C. 817, 822, 82 L. Ed. 1188, 1194, this Court ruled that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State, and that there is no Federal general common law. This Court said (304 U. S., l. c. 78):

> "Third. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal concern. There is no federal general common law."

In **Guaranty Trust Co. v. York** (June 18, 1945, not yet officially reported), 89 L. Ed. 1418, 65 S. C. 1464, which is believed to be the last word on the subject, this Court ruled that in essence the intent of the decision in **Erie R. Co. v. Tompkins** was to insure that in all cases where a Federal Court is exercising jurisdiction solely because of the diversity of the citizenship of the parties, the outcome of the litigation in the Federal Court should be substantially the same as it would be if tried in a State Court. This Court there said (65 S. C., l. c. 1470):

> "Erie R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy between State and federal courts. In essence, the intent of the decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because ,of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to substantially different results."

It is believed, therefore, that this Court has left open and undecided the question whether Federal law or local law controls in determining the provability of interveners' claims where, as here, jurisdiction of the Federal Court does not depend upon diversity. It is believed further, however, that the one or the other is controlling, and whether the controlling law here is the Federal law or the local law, nevertheless, as we have shown above, the claims of interveners are provable under Sec. 63 (a) (4) of the Bankruptcy Act. It is believed that the Federal law, if applicable here, consists of the general law as set forth hereinabove.

CONCLUSION.

This case involves matters of importance in the administration of the Bankruptcy Act. It involves the proper application of local decision to question of local law. It involves the proper application of the rule in **Erie R. Co. v. Tompkins** to the determination of the provability of interveners' claims. These matters in order to avoid continuing confusion and litigation should be forthwith reviewed in this Court by Writ of Certiorari.

Respectfully submitted,

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January 9, 1946.